Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Expanding Consumers' Video Navigation Choices	)	MB Docket No. 16-42
	)	
Commercial Availability of Navigation Devices	)	CS Docket No. 97-80
	)	

COMMENTS OF ROKU, INC.

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TABLE OF CONTENTS

Page

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Roku, Inc. ("Roku") hereby submits comments in response to the Notice of Proposed Rulemaking ("NPRM") issued in the above-captioned dockets.[1]

INTRODUCTION AND SUMMARY

The NPRM seeks to promote competitive alternatives to the traditional cable set-top box.[2] As an industry leader in TV video streaming, Roku shares that goal. Roku provides consumers with the ability to purchase a wide range of low-cost Roku streaming players and Roku co-branded smart TVs that run Roku's proprietary operating system for streaming to the television and leverage the powerful search and discovery capabilities of Roku's purpose-built, cloud-based streaming platform. Like the Commission, Roku believes in a world in which consumers no longer need to rent set-top boxes from their pay TV operator in order to gain access to the programming to which they subscribe.

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[1] *Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, MB Docket No. 16-42, CS Docket No. 97-80, FCC 16-18 (rel. Feb. 18, 2016).

[2] NPRM at ¶ 1.

Over the past several years, competitive pressure from companies like Roku has accelerated the video entertainment industry's move to over-the-top ("OTT") delivery. Just as broadband internet eliminated the walled gardens of CompuServe and AOL, OTT video distribution platforms like Roku's are unleashing a new world of television content and advertising. Today, anyone can purchase a Roku streaming device for less than $50 and with an internet connection access hundreds of thousands of movies, TV shows, music and other content from more than three thousand channels—including networks traditionally available only through the traditional cable set-top box, such as ESPN, HBO, and Showtime. The cable company is one option for accessing TV content, but, increasingly, it is not the only option.

Roku believes that, rather than accelerate the pace of change and innovation, the Commission's proposed rules could actually inhibit the transition from traditional programming delivery models to OTT services. Today's video distribution marketplace is marked by tremendous innovation and rapid change. The proposed rules carry a very real and significant risk of impeding the innovation that is occurring today by replacing today's market-driven advances that are expanding consumer choice with a lengthy rule making and standard-setting process. Furthermore, the proposed rules could force industry participants to conform to a single *de facto* standard that will squeeze out novel products and services that would otherwise emerge using alternative standards and technologies. For example, the ability to deploy an operating system that runs on low-cost chips allows Roku to offer streaming devices for under $50 without subsidizing the hardware sale.

In addition, many of the factual premises underlying the proposed rules are inconsistent with Roku's experience in the marketplace. For example, the NPRM asserts that multichannel video programming distributors ("MVPDs") lack the incentives to negotiate with competing device manufacturers. In fact, Roku has entered into productive business arrangements with multiple MVPDs, including large MVPDs such as CenturyLink, Charter, Comcast, Dish, and Time Warner Cable. Likewise, the NPRM suggests that in order to provide consumers with meaningful choice among competing products, any competitive navigation device must be "unaffiliated" with MVPDs, including through business-to-business arrangements. But such business-to-business arrangements are the foundation for many successful competitive platforms. Moreover, the NPRM states that competition can flourish only if competitive device manufacturers have complete control over the user interface that the consumer utilizes to find select and otherwise interact with available programming. In Roku's experience, the user interface is an integral part of a video service, including its economics. Mandating that full control of a video service's user interface be given to third parties would be a significant disruption to the industry that would also impact content owners, advertisers, consumers, and others.

More fundamentally, the driving force behind the NPRM, and Section 629 of the Communications Act,[3] is the notion that MVPDs have market power in the distribution of video content and should be prevented from leveraging that market power to control devices. However, MVPD market power in video distribution is waning through competition from OTT sources and changes in consumer behavior. Put simply, marketplace forces are already addressing the problem that the Commission proposes to address with new rules. For this reason, Roku does not believe that new rules are necessary to vindicate Congress's intent in enacting Section 629.

[3] 47 U.S.C. § 549.

Today, the more significant source of MVPD market power is their control over broadband internet access, which provides them with opportunities to engage in various discriminatory practices to unfairly compete with emerging OTT video distribution platforms and services. In Roku's view, the Commission would better serve the public interest by directing resources away from addressing MVPD control over set-top box choice—which is already being redressed by market forces—and instead remain vigilant against potential anticompetitive behavior in broadband internet access, where MVPD market power is increasing and likely to persist.

DISCUSSION

I. THE VIDEO DISTRIBUTION MARKET IS RAPIDLY CHANGING AND IS BECOMING MORE COMPETITIVE

Roku pioneered streaming for the TV and enjoys a growing, passionate, and highly engaged customer base. Roku was founded in Palo Alto, California in 2002 by Anthony Wood, an entrepreneur who is recognized as the inventor of the digital video recorder. Today, the company has about 10 million monthly active accounts, making it one of the largest video distribution platforms in the United States. Roku's low-cost hardware, powerful and efficient software, and easy-to-use user interface have helped drive changes in video consumption and impacted the competitive landscape of the video industry. Today, consumers around the world use Roku devices to access a wide variety of content available on the Roku platform.

Unlike other major OTT device vendors, Roku does not prioritize search results based on source, but rather empowers consumers to discover and access the content of their choosing from a wide selection of channels. Roku's open platform and easy-to-use development tools have allowed niche programming to flourish and enabled local communities, local institutions and other independent content producers to create their own Roku channels. Consumers use Roku devices not only to access their favorite content, including special interest programming, movies, and TV shows, but also to customize the interface and provide quick access to those channels that the consumer uses most. Consumers enjoy a comprehensive and unbiased universal search feature that looks across 35 top streaming channels to return search results. Consumers can also access a first-of-its-kind discovery feature called the Roku Feed that lets consumers know when their favorite entertainment becomes available for streaming—and at what price. Rather than steer consumers to its own content store or prioritize one content provider over another, Roku ranks search results by price, so that consumers can see where movies and shows are free or cheapest to watch.

In the video distribution marketplace, innovation is taking place on both a technological level and in the development of new business models for distributing programming to consumers over the internet. The intense competition among OTT platforms and services has allowed the OTT video market to develop rapidly even without some of the regulatory tools, such as program access or retransmission consent, that traditional MVPDs can invoke to obtain content. The competing visions for the OTT market from platforms as diverse as Roku, Google, Apple and Amazon has also benefited consumers, who have seen low or falling prices for an increasingly powerful array of OTT devices.[4]

Consumers have responded by experimenting among the available OTT products and service offerings. Consumers often do not choose one OTT device over another, but rather purchase multiple, low-cost OTT devices and then select their favored method for video consumption. According to Strategy Analytics' senior research analyst Chirag Upadhyay, "U.S.

[4] Other OTT platforms, such as Apple, Amazon, and Google, offer closed content-consumption services or exclusive content. Still other OTT platforms, such as TiVo, have focused more on supplying software and equipment for MVPD providers' set-top box offerings.

broadband homes own an average of 2.3 [OTT] devices, giving them multiple means by which to stream video and audio content to the TV."[5] In his 2015 analysis, Mr. Upadhyay found that, while some consumers have a preferred OTT device, most households switch among devices depending on the user and type of content viewed.[6]

In response to the host of competitive offerings and business models in the OTT market, MVPDs have adopted OTT delivery as a competitive imperative, and as a way to provide more value to their customers. Time Warner Cable, for example, developed an application for the Roku platform that allows their subscribers to access all of the channels included in their subscription via a Roku player or Roku TV. CenturyLink and Charter also developed video streaming applications and services that are available in certain market areas, and other MVPDs are currently engaged with Roku in development of both full-platform MVPD channel lineups and "skinny bundles" of select content using the Roku platform. And, most recently, Comcast announced its intent to release an Xfinity application on the Roku platform, so that its subscribers will be able to access their full pay TV subscription using a Roku player or Roku TV.

In the NPRM, the Commission took a dismissive view of the proliferation of MVPD apps on third-party OTT platforms. While the NPRM claimed that MPVD apps "do not offer consumers viable substitutes to a full-featured, leased set-top box" and "have only provided access to the MVPD's user interface rather than that of the competitive device,"[7] just the opposite is the case. The DSTAC report, for instance, recognized that MVPD apps are now available on more than 450 million devices, and MVPD apps have been downloaded more than

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[5] *See*, David Watkins and Chirag Upadhyay, Strategy Analytics, *Chromecast Takes 35% of the 42 Million Unit Global Digital Media Streamer Market in 2015*, http://tinyurl.com/z46hzka.

[6] *Id.*

[7] NPRM ¶ 16.

50 million times just to iOS and Android devices.[8] Roku's experience with consumer adoption and use of MVPD apps has been very positive. Roku has found that in geographic markets where MVPD apps are available they are downloaded by large numbers of subscribers and are used on a regular basis once they have been downloaded. The Time Warner Cable app ranks among the most highly used apps of the more than 3,000 apps on Roku, even with the app currently available only in select markets. Roku also expects these positive trends to continue over time, especially as more MVPDs develop and promote Roku apps to their subscribers.

Indeed, the emergence of OTT platforms such as Roku's that enable consumers to access a wealth of video content from a wide variety of content providers has helped untether video consumption from traditional multichannel subscription television services. Writing in the *Harvard Business Review*, Janet Balis has described how OTT is forcing content providers of all kinds to forge new, more durable relationships with their viewers.[9] As OTT has "disintermediat[ed] traditional media pipes to the audience," OTT is "compel[ling] brands to maximize ownership of consumer touch points to deliver content, experiences, and products."[10] OTT, in other words, is forcing traditional content providers, including MVPDs, to "up their game" to capture consumer attention in an increasingly competitive market for viewing time. MVPDs are now just another application developer that can capture market share only by "build[ing] more purposefully direct, longer term relationships with consumers."[11] Just as certain websites "create highly compelling interactions shaped by data," OTT application

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[8] Final Report of the Downloadable Security Technology Advisory Committee, Working Group 4 Report, at 72-73.

[9] Janet Balis, *What an OTT Future Means for Brands*, Harvard Business Review (May 13, 2015), https://hbr.org/2015/05/what-an-ott-future-means-for-brands.

[10] *Id.*

[11] *Id.*

developers, including MVPDs, can win viewers' attention only by offering a more compelling product in a video-consumption market that is awash in competitive offerings of content.[12] In this environment, ill-considered intervention into the market threatens to upend the very forces that are driving content providers of all types to innovate and evolve their old business models for the new forms of online video distribution that consumers increasingly want.

II. MANY OF THE PREMISES UNDERLYING THE COMMISSION'S PROPOSED RULES ARE AT ODDS WITH ROKU'S EXPERIENCE IN THE MARKETPLACE

The NPRM's proposed rules rest on a variety of assertions about the current state of the video marketplace that are inconsistent with Roku's experience. Any regulatory intervention should draw from actual realities of today's marketplace, rather than assumptions about potential problems in the marketplace. Roku highlights below a few of the assertions in the NPRM that are not justified.

<u>Need for "Unaffiliated" Devices.</u> The NPRM repeatedly states as a goal the deployment of devices and user interfaces from "companies unaffiliated with an MVPD."[13] The NPRM goes so far as to declare that competitive device manufacturers must have "no business relationship with any MVPD."[14] That is an unduly narrow view of competition, and to the extent that the NPRM is suggesting that business-to-business relationships create an affiliation that is somehow problematic or is not generating competitive devices, that description simply is not accurate. Roku is an independent company that developed its own innovative platform for streaming video over the internet. Roku's negotiations with MVPDs are hard fought; its agreements, hard won.

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[12] *Id.*

[13] *See, e.g.,* NPRM ¶ 25.

[14] *Id.* ¶ 23.

Roku's innovative OTT platform both enabled and motivated MVPDs to reach their subscribers through Roku players and Roku TVs purchased by their subscribers. Roku's arm's length agreements with MVPDs are not "purely at the discretion of the MVPD,"[15] but rather arose because both sides found common interest in meeting the growing demand of consumers for the ability to access the programming to which they subscribe on the device or the devices that they chose. In other words, business-to-business relationships are promoting competitive alternatives, rather than restricting them. It would be a mistake for the Commission to assume that a contractual relationship with an MVPD nevertheless means that navigational devices somehow are controlled by an MVPD or are not competitive.

Moreover, the NPRM is misguided when it dismisses business-to-business arrangements on the ground that they have not produced perfect substitutes for the "full-featured, leased set-top box."[16] One of the great benefits of a competitive market is that it offers consumers an array of choices, and there is no reason to think that the legacy leased set-top box (long criticized as expensive and cumbersome) is somehow the ideal against which to compare the choices now available to consumers from innovative companies like Roku. Some consumers would prefer to pay less and not have certain features, such as a built-in DVR, or would prefer to have a different set of features than the box available from their MVPD, such as voice search. Indeed, the variation in features, services, and price points of today's device marketplace is evidence of a thriving and competitive market, not one that needs fixing.

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[15] *Id.* ¶ 16.

[16] *Id.*

MVPDs' Incentive to Negotiate. The NPRM similarly asserts that MVPDs "have an incentive to withhold permission or constrain innovation,"[17] and that any arrangements exist "purely at the discretion of the MVPD."[18] The NPRM's description of MVPDs having no interest in negotiating with competing device manufacturers is not consistent with Roku's experience. MVPDs are responding to the reality of OTT competition in a variety of ways, including working with a number of third-party device manufacturers such as Roku. In Roku's experience, MVPDs find that working with Roku and other third-party device manufacturers increases customer engagement and increases customers' satisfaction, which reduces churn without adding incremental capital or operating costs to the MVPD's business.

Furthermore, MVPDs' eroding market power over end-user access to video content has provided them with strong incentives to collaborate with third-party device providers simply to retain and expand their consumer base.

Competitiveness of MVPD Apps. The NPRM argues that rules are needed because consumers' principal source for navigation is "the leased set-top box, or the MVPD-provided application."[19] But the "leased set-top box" and the "MVPD-provided application" are not at all equivalent. MVPD apps by definition are available on third party devices—millions of third party devices—and indeed MVPDs must give up control of top-level user interface to deploy their apps on third party devices. Thus, MVPD applications are fundamentally *unlike* leased set-top boxes precisely because they enable MVPD customers to access the MVPD services on third-party devices. When a consumer uses a third party streaming device that includes an MVPD app, the consumer can select to access programming through the MVPD app or through

[17] *Id.* ¶ 12; *see also id*. at ¶¶ 15, 25.

[18] *Id*. ¶ 16.

[19] *Id*. ¶ 13.

any other app or service available on the applicable platform. In the case of the Roku platform, the top level user interface enables the consumer to search for content across a variety of apps, navigate directly to specific streaming content that the user has chosen to follow, download new channels from Roku's Channel Store that includes more than 3,000 apps, or use any app that the user has previously installed.

Requiring Control of User Interface. The NPRM suggests that competitive device providers must have access to fundamental components of the user interface,[20] but many features of the user interface are central to the video service itself. Roku's own user interface, which it has invested significant time and resources developing and continuing to evolve, is a central feature of its service. Roku's content providers (including MVPDs, Netflix, Amazon, Hulu, HBO, CBS, etc.) also treat the user interface within their app as an integral feature of their service. Roku and other competing device manufacturers have successfully preserved their own user interface without the necessity of co-opting every aspect of the content partner's user interface, and Roku and others have thrived with shared control of user interface. To simply hand over the user interface of a video service to an unaffiliated third party would be a significant disruption to the industry that would also impact content owners, advertisers, consumers, and others, and would be inconsistent with the successful model that has emerged in the marketplace.

In sum, Roku is concerned that many of the factual assertions in the NPRM, which form the justification for new rules, are not an accurate reflection of what is occurring in today's dynamic marketplace. Roku encourages the Commission to ensure that any actions it takes are informed by accurate assessment of the evolving video distribution industry.

[20] *See, e.g.,* NPRM ¶ 12 (asserting that "competition in the user interface … is essential to achieve the goals of Section 629").

III. THE COMMISSION'S PROPOSED RULES COULD STIFLE INNOVATION AND HARM CONSUMERS

As discussed above, Roku shares the Commission's goals of providing competitive alternatives to cable-leased set-top boxes. But Roku is gravely concerned that the NPRM's proposed rules could create significant unintended consequences that could have the unintended consequence of stifling innovation rather than advancing it. Ultimately, Roku believes that the proposed rules would be harmful to consumers.

A. The Proposed Rules Would Threaten Innovation

Currently, OTT distributors and device manufacturers are in an explosive period of innovation and are experimenting with a variety of platforms and models to serve consumers. The OTT device market is today intensely competitive with multiple vendors, such as Google, Apple, TiVo and Roku, as well as smart TVs from brands such as Insignia, Samsung, LG, Vizio and others, taking widely divergent approach to the product market.

The proposed rules threaten to put a halt to much of that innovation and growing competition. Roku believes that the proposed rules would create significant uncertainty in the industry, and the reality is that any standard-setting process is likely to be a multi-year process that would lead to disputes within the industry over the direction of any new standards. During the potentially lengthy period of uncertainty, both device makers and video providers would lose the incentive to continue innovating in the manner that is occurring and growing today. Moreover, even if the standards setting process is not intended to establish a single exclusive standard, the result could become a *de facto* standard that will squeeze out innovation that otherwise would occur using alternative standards and technologies. (Any interim fallback standard could have the same effect). The establishment of a standard could also have the effect of choosing one business model over another, which risks sapping innovation from this vibrant industry. And, while the NPRM points to the need for "some standardization,"[21] such standardization best promotes competition and the public interest when it flows from market forces.

B. The Proposed Rules Could Undermine Customer Service

Today's third-party devices are a product of cooperative relationships between content providers, including MVPDs, and device manufacturers. The terms of negotiated agreements, coupled with ongoing relationships between MVPDs and third-party device manufacturers, lead to cooperative resolution of performance issues that could impact consumers. Roku works diligently with all of its content providers to pre-empt if possible, quickly address, and resolve cooperatively any issues that would affect the consumer experience.

In the world envisioned by the NPRM, however, MVPDs would be forced to deliver content and a variety of data to third-party manufacturers with whom they might not otherwise choose to do business. When issues arise with respect to performance or a consumer's experience, there is far less likelihood of rapid and satisfactory resolution for consumers. Consumers will not know to whom to direct complaints, MVPDs and manufacturers each will have incentives to point fingers at the other, and the lack of established and ongoing relationships will impede cooperation.

In a world without contractual relationships between MVPDs and the device manufacturers, the loser would be the consumer. A mandated system that requires problems to be addressed and resolved by parties without any direct relationship is unlikely to serve consumers as effectively as the current system of device manufacturers and content providers working cooperatively in the common service of consumers.

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[21] NPRM ¶ 42.

C. Wresting Away Control of the User Interface Could Result in Higher Costs to Consumers

The user interface plays a more important role in the economics of video distribution than the NPRM appears to acknowledge. User interface provides a critical vehicle for MVPD sign-ups, content discovery, subscriber retention and revenue, each of which can impact the profitability of the video service. User interface is also a vital opportunity for MPVDs to offer step-up options from low-price, entry-level packages. A common practice is to offer low-price entry-level video packages, and then sell step-up options within the user interface. Indeed, the entry price option may be a loss-leader, so the loss of control over user interface may lead to the loss of ability to offer discounted service while promoting additional services, with the net result being that prices may rise. As a result, rules that sever MVPDs from the user interface could lead to a reduction in low-price packages, or lead video distributors to pursue additional revenue streams from consumers to make up the lost revenues derived from the user interface. In this regard, a potential unintended consequence of the Commission's proposed rules could be increased costs to consumers. On the other hand, business-to-business arrangements between MVPDs and OTT platforms, such as Roku, are cost-effective for MVPDs and reduce consumer costs.

IV. THE COMMISSION'S PROPOSED RULES ARE INCONSISTENT WITH THE TEXT AND PURPOSE OF SECTION 629

Section 629 of the Communications Act instructs the Commission to "adopt regulations to assure the commercial availability, to consumers . . . of . . . equipment used . . . to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor."[22] Section 629 reflects Congress's goal of ensuring alternatives to the leased set-top box provided as part of a cable service.[23]

Today, the factual realities of the video distribution market are enabling competitive alternatives to the leased set-top box without additional regulation. Competition from OTT distributors and other MVPD competitors has begun to reduce MVPD market power over video content. MVPDs at last are starting to lose the ability to restrict distribution of their services to their own leased set-top boxes, and consumers today can "access multichannel video programming and other services offered over multichannel video programming systems"[24] from millions of competitive devices, such as Roku's.

And, indeed, Congress recognized that the factual circumstances could change and that the MVPD bottleneck control over content that it existed in the early- to mid-1990s was not necessarily inevitable and for all time. Congress accordingly built in provisions to Section 629 such as a sunset clause to accommodate changed circumstances.[25] Congress thus recognized that the competitive landscape could evolve and that regulation was appropriate only when necessary to create competitive alternatives to the leased set-top box.

In the current marketplace, the best approach to advancing the pro-competitive goals of Section 629 is an exercise in regulatory restraint that allows independent OTT device manufacturers to continue to offer consumers competitive means of accessing a rich variety of video programming. Aggressive new rules would not be a faithful application of Congress's

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[22] 47 U.S.C. § 549(a).

[23] *See, e.g., General Instrument Corp. v. FCC*, 213 F.3d 724,727 (D.C. Cir. 2000).

[24] 47 U.S.C. § 549(a).

[25] *See* 47 U.S.C. § 549(e).

intent in enacting Section 629 at a time when the marketplace is alleviating the very concerns that motivated Congress to adopt the law in the first instance.

V. THE COMMISSION SHOULD CONTINUE TO RIGOROUSLY FOCUS ON MVPDS AS BROADBAND INTERNET ACCESS PROVIDERS

For the reasons described above, Roku believes that the NPRM rests on a misapprehension of today's market for the distribution of TV video services. That misapprehension manifests itself in proposed set-top box rules designed to redress MVPD market power that is diminishing without the need for Commission action.

Instead, the Commission should maintain its focus and vigilance on the principal area where MVPDs retain significant market power—in the market for broadband internet access, where MVPDs derive significant market power from their control over end-user access to broadband Internet services.

The Commission's Open Internet rules were a positive step in ensuring that MVPDs do not leverage their bottleneck control over broadband in an anticompetitive manner, but the Commission must continue to be vigilant in preventing potential anticompetitive behavior in broadband internet access services. Robust open-internet protections represent a critically important check on unfettered MVPD market power over the market for broadband internet access services. And, successful OTT deployment requires an open internet as a vital input. In particular, Roku remains concerned that the use of data caps and "zero rating" practices could become tools for MVPDs to discriminate against OTT competitors. The Commission should not allow this proceeding to draw resources and attention from where they are needed most: broadband.

CONCLUSION

For the foregoing reasons, Roku shares the Commission's goals of promoting competitive alternatives to the leased set-top box. But growing OTT competition has enabled the emergence of alternatives devices through market forces, and new set-top box rules could inadvertently stifle emerging competition and the innovation it has spurred. The Commission's oversight would be better directed at MVPDs as broadband providers, not MVPDs as set-top box providers.

Respectfully submitted,

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